United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

74-1151

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter of the Arbitration of
Certain Controversies between

JOHN HOH, as President of BREWERY WORKERS LOCAL 3, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; and NEIL BORRA, as President of BREWERY DELIVERY EMPLOYEES, LOCAL 46, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners-Appellants,

-and-

PEPSICO, INC., and its wholly owned subsidiaries RHEINGOLD CORPORATION and RHEINGOLD BREWERIES, INC.,

Respondents-Appellees.

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PETITIONERS-APPELLANTS SUPPLEMENTAL AND REPLY MEMORANDUM OF LAW

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STATEMENT OF ISSUES

1. A. ON AN APPLICAITON FOR A TEMPORARY INJUNCTION AN EVIDENTIARY HEARING IS REQUIRED WHERE THE AFFIDAVITS AND EVIDENCE REVEAL A FACTUAL DISPUTE.

   B. RULE 52, FRCP REQUIRES FINDINGS OF FACT AND CONCLUSIONS OF LAW WHICH ARE WHOLLY ABSENT IN THIS CASE.

2. THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN BOYS MARKET ESTABLISHES THE PRINCIPLE THAT NORRIS LA GUARDIA IS INAPPLICABLE IN SUITS TO COMPEL ARBITRATION.

3. NO AUTHORITY HAS BEEN CITED BY THE COURT BELOW OR THE APPELLEES SUSTAINING THEIR VIEW THAT THE TEST OF PROBABILITY OF SUCCESS ON THE MERITS, REFERS TO LIKELIHOOD OF SUCCESS BEFORE THE ARBITRATOR.

4. THE LOWER COURT ABUSED ITS DISCRETION WHEN IT FAILFD TO PROPERLY APPLY THE LAW.

POINT I

A. ON AN APPLICATION FOR A TEMPORARY INJUNCTION AN EVIDENTIARY HEARING IS REQUIRED WHERE THE AFFIDAVITS AND EVIDENCE REVEAL A FACTUAL DISPUTE

It is virtually "hornbook" law that upon an application for a preliminary injunction, when the written evidence reveals a factual dispute, an evidentiary hearing must be provided. Murray v. Kunzig, C.A. 1972, 462 F.2d 871; Warner Bros. Pictures, Inc. v. Gittone, CCA 3rd 1940, 110 F.2d 292.

See also Carpenters District Council v. Cicci, 261 F.2d 5, 43 LRRM 2150 (C.A. 6 1958), when the Sixth Circuit stated, at p. 6,

> ". . . if the allegations of a complaint are denied by a defendant, he is entitled to

> a hearing, which includes the right to offer evidence in support of his factual claim. Rule 65, Rules of Civil Procedure, contemplates that the issuance of a preliminary injunction shall be upon notice to the adverse party and after a hearing. A hearing embodies the right to be heard on the controverted facts, as well as upon the law. Sims v. Greene, 161 F. 2d 87, C.A. 3rd; City Line Center, Inc. v Loews, Inc., 178 F. 2d 267, C.A. 3rd; General Electric Co. v. American Wholesale Co., 235 F. 2d. 606, 609 C.A. 7th; Hawkins v. Board of Central of Florida, 253 F. 2d. 752, C.A. 5th." (Emphasis added).

As a result of the District Court's failure to hold such a hearing, the Sixth Circuit reversed and remanded with instructions to the District Court to hold a hearing if a party desires it, and ". . . any action taken by the Court shall be upon findings of fact and conclusions founded upon the evidence, in accordance with Rule 52(a)." (261 F. 2d. 5, at p. 6).

In Sims v. Greene, Judge Biggs observed,

> "The allegations of the pleadings and affidavits filed in the cause are conflicting. Such conflicts must be resolved by oral testimony since only by hearing the witnesses and observing their demeanor on the stand can the trier of fact determine the veracity of the allegations made by the respective parties. If witnesses are not heard the trial court

> will be left in the position of preferring one piece of paper to another....
>
> "Rule 65(a) provides that no preliminary injunction shall be issued without notice to the adverse party. Notice implies an opportunity to be heard. Hearing requires trial of an issue or issues of fact. Trial of an issue of fact necessitates opportunity to present evidence and not by only one side to the controversy....
>
> "[A]fter evidence has been presented by both sides an opportunity must also be afforded to both sides to argue the effect of that evidence to the court."

In the instant case, the affidavits and factual allegations made at the argument are in sharp conflict as to essential elements to be determined by the Court on an application for a preliminary injunction.

At the outset, on the question of the propriety of the removal to the District Court from the State Court, counsel for the petitioners-appellants offered to testify concerning the meaning and intent of the contractual provision in which the parties to the collective agreement waived resort to the removal procedure (Tr. pp. 10, 45-46). The District Court refused to hear such testimony and found in favor of respondents-appellees (Tr. pp. 44-46, Decision p. 3).

The Court below did acknowledge that:

> "There is no doubt that the Rheingold employees would sustain a great hardship from the shutdown of the brewery and their subsequent unemployment, a situation which everyone deplores. (Decision, p. 3).

However, in "balancing the equities", which is required in making a determination as to the granting or denying of the preliminary injunction, the Court below failed to hold a hearing on the following disputed allegations of the parties:

1. Respondent-appellees claimed that petitioning unions were notified as early as December 1973 of the closing on January 31, 1974. (Ahern Affidavit of February 1, 1974, pp. 8-10).

Petitioners-appellants claimed that they were not given notice of the date of closing until January 25, 1974, one week before the shutdown date. (Petitions of John Hoh and Neil Borra, dated January 30, 1974 at p. 4, Transcript pp. 26-33).

Clearly in a court of equity the issue of the applicants good faith and the issue of whether or not he "sat on his rights" are crucial and should not have been decided without a hearing.

2. Respondents-appellees used at least two different figures in alleging their anticipated money loss if the brewery were kept open for even one week. First counsel for respondents-appellees alleged that the loss would be $1.5 million (Tr. pp. 63-64). Then he asserted that without going into full production the loss would only be $500,000 (Tr. p. 64).

Mr. Sipser, counsel for the petitioners-appellants challenged both of those assertions, and claimed that it would be less than $100,000 (Tr. p. 64).

Clearly, in weighing the relative hardships to the parties, the reality of the loss figures are vital. Nevertheless, the Court took no further evidence on this point.

Of course, if it were proper to inquire into the merits of petitioners-appellants' claims in arbitration, which we urge it was not, there would have been any number of further factual findings to be made.

Finally, respondents-appellees stress in their

brief that there was no time for a hearing on any factual matters. (Respondents-appellees' brief, pp. 24-25).

Nevertheless, attorneys for both sides spent 7 hours with Judge Bartels on Saturday, February 2, the day after the argument, on the question of a stay pending appeal. Clearly that time could have been spent on an evidentiary hearing as could Sunday, February 3.

B. RULE 52, FRCP REQUIRES FINDINGS OF FACT AND CONCLUSIONS OF LAW WHICH ARE WHOLLY ABSENT IN THIS CASE

Furthermore, the Court below erred in failing to set forth findings of fact as required by the Federal Rules of Civil Procedure 52(a).

Rule 52(a) provides in part that:

> "In all actions tried upon the facts without a jury . . . the court shall find facts specially and state separately its conclusions of law thereon . . . and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action." (Emphasis added).

This rule as applied to interlocutory injunctions is mandatory. Carpenters District Council of United Brotherhood of Carpenters and Joiners of America v. Cicci, 261 F.2d 5, 43 LRRM 2150 (CA6 1958); Bateman v. Ford Motor Co., 310 D.2d 805 (CA 3 1962).

As the Court stated in Carpenters' District Council, supra:

> "No formal findings of fact were made. In this respect we are of the opinion that the District Judge failed to comply with the requirments of Rule 52(a); Rules of Civil

> Procedure, which provides that in granting or refusing interlocutory injunctions the court shall set forth the findings of fact.... This rule is mandatory. Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316-317; Shannon v. Retail Clerks Protective Assn., 128 F.2d 553, 555 C.A. 7th; Bowles v. Russell Packing Co., 140 F.2d 354 C.A. 7th. We realize that the preliminary injunction contains certain recitals which give in a general way the factual background upon which the injunction is based. Such recitals, however, are not in our opinion a fair compliance with the requirements of Rule 52(a). Bank of Madison v. Graber, 158 F.2d, 137, 141 C.A. 8th." 43 LRRM at 2151. (Emphasis added).

It is equally clear that in the instant case, the general recitals of the Court below fail to comply with the requirements of Rule 52(a). The Court below merely set out in a general way the factual contentions of each party as to the relative hardships and necessity of an injunction. It made no specific factual findings as to these matters and merely recited that "[t]here is no doubt that Rheingold employees would sustain a great hardship from the shutdown of the brewery and their subsequent unemployment...." There is not a single word as to a finding regarding hardships or injury, or as to the necessity for an injunction. The Court below rested its entire decision on a conclusion that the respondents-appellants would not likely succeed on the merits in arbitration, a conclusion which is both erroneous and unsupported by factual finding.

POINT II

THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN BOYS MARKET ESTABLISHES THE PRINCIPLE THAT NORRIS-LA GUARDIA IS INAPPLICABLE IN SUITS TO COMPEL ARBITRATION

In its recent decision in Boys Markets, Inc. v. Retail Clerks Union Local 770, 398 U.S. 235, the Supreme Court reexamined the Norris-LaGuardia Act and its prior decision in Sinclair Refining Co. v. Atkinson, 370 U.S. 195 which had the effect of prohibiting Federal Courts from issuing injunctions in labor cases except in very limited circumstances.

In Boys Market, supra, the Supreme Court held that:

> "The literal terms of Section 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provision of Section 301(a) of the Labor-Management Relations Act and the purposes of arbitration."

The Court further held an important federal policy was involved in the peaceful settlement of disputes through the arbitral process and that this important policy would be imperiled if equitable relief were not available to implement it. Hence it was concluded that the Norris-LaGuardia policy of non-intervention by Federal courts should yield to the overriding interest in the successful implementation of the arbitration process.

The Boys Market's decision holds that it is appropriate for a court to grant injunctive relief to compel arbitration upon a finding that the dispute in question is subject to adjustment and arbitration under the collective bargaining agreement, and upon a further finding that the petitioner has suffered irreparable injury and will continue to suffer irreparable injury.

In the pre-Boys Market case of Spritzer v. Ford Instrument Division, 72 LRRM 2073, D.C. N.Y. (1969), cited by the appellees, Federal District Judge Abruzzo denied an application for injunctive relief to enjoin the closing of the employer's Long Island City plant on the sole premise that said matter involved or grew out of a labor dispute. Section 4(a) Norris-LaGuardia Act, 29 U.S.C. Section 104; Sinclair Refining Co. v. Atkinson, supra. The Spritzer case and the cases upon which it was based have been rendered nugatory by the Boys Market decision.

POINT III

NO AUTHORITY HAS BEEN CITED BY THE COURT BELOW ON THE APPELLEES SUSTAINING THEIR VIEW THAT THE TEST OF PROBABILITY OF SUCCESS ON THE MERITS, REFERS TO LIKELIHOOD OF SUCCESS BEFORE THE ARBITRATOR.

None of the cases cited by appellees in their brief stands for the proposition urged upon and accepted by the Court below that the test of probability of success on the merits in a 301 suit refers to the likelihood of success before the arbitrator. Indeed, appellants have found no case which so holds. On the contrary, the courts have been unanimous since the decision in the Steelworkers Trilogy that it is not within their province to consider the merits of a dispute which is subject to arbitration.

Appellants have referred to a series of cases in their principal brief dealing with this question, and sustaining their position that the probability of success on the merits criteria used by the Court below was erroneous. We should like to call the Court's attention, in addition, to the recent case of Local No. 6 Bricklayers, Masons and Plasterers v. Heminger, decided August 9, 1973, 84 LRRM 2033, CCA 6, which deals directly with this point. Said the Court:

"We hold that the District Court misconstrued its mandate. The duty of the courts is not to determine whether a prima facie case on the merits has been put forth by the party seeking arbitration. It is not the province of the court to look into the facts of the case. Chambers v. Beaunit Corp. 404 F.2d 128, 130, 69 LRRM 2732 (6th Cir. 1968), American Radiator & Standard Sanitary Corp. v. Local 7, International Brotherhood of Operative Potters, 358 F.2d 455, 458, 61 LRRM 2664 (6th Cir. 1966). The arbitrator is not to be viewed as a special master who will be called in after a prima facie case on the merits has been made out.

"In the context of this case, the burden of the unions was not to present a prima facie case on the creation of a sham or alter ego corporation by the employer. The burden was to show that, assuming there was a sham or alter ego corporation created by the Heminger Corp., there would then be a violation of the collective bargaining agreements. We have no doubt that such an asserted violation would be within the scope of the three arbitration agreements in question. In signing these arbitration agreements, the parties agreed to 'submit all grievances to arbitration, not merely those that a court may deem to be meritorious.' American Mfg., supra, 363 U.S. at 567, 46 LRRM at 2416."

The case of Brandenburg v. Capital Distrib. Corp., 353 F.Supp. 115, relied on by the appellees does not in any way negate this proposition. There the court was concerned merely with the question of whether the suit before it was a subject for arbitration. In that connection, of course, the court had to examine the contract provision to determine arbitrability. That issue is not before the Court.

The Court below here, misconstrued its mandate, just as did the District Court in the Bricklayers case cited above. Here, as there, this constituted reversible error.

POINT IV

THE LOWER COURT ABUSED ITS DISCRETION WHEN IT FAILED TO PROPERLY APPLY THE LAW.

It is absolutely clear than an error made by the lower court in applying the law rather than interpretating the facts in granting or denying a preliminary injunction constitutes an abuse of discretion. As stated in Wright & Miller, Federal Practice and Procedure: Civil, §2962 (1973):

> "On the other hand, if the lower court's decision rests on an interpretation of the law rather than on the facts, the appellate court is not as limited in its review and may reverse if it feels that the lower court's view of the law was erroneous. As stated by one court, 'the trial court abuses its discretion when it fails or refuses properly to apply the law to conceded or undisputed facts.'" Wright & Miller, Vol. 11 at 636, 637 (notes omitted).

As stated by the court in Empresa Hondurena de Vapores, S.A. v. McLeod, 300 F.2d 222, 231 (CA 2 1962):

> "The issue being one of law the standard is whether we think the District Court was wrong not whether he was clearly so...."

See also, Delaware & Hudson Ry. Co. v. United Transp. Union,450 F.2d 603, 620 (CA D.C. 1971), cert. den. 403 U.S. 911; Societe Comptoir De L'Industrie Cotonniere Etablissements Boussac v. Alexander's Dep't. Store, Inc. 299 F.2d 33 (CA 2 1962).

The principal error urged by appellants i.e. that the court below wrongfully passed upon appellants claims in arbitration, are matters of law and not of fact. Clearly, as such, the lower court has abused its discretion in denying the preliminary injunction on this ground.

CONCLUSION

For all of the foregoing reasons, the Decision and Order of the Court below should be reversed and petitioners-appellants' application for a direction to proceed to arbitration and a preliminary injunction pending the determination of said arbitration should be granted in its entirety.

Respectfully submitted,

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